

**THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION**

CRIMINAL CASE NO. 4:94cr44-1

UNITED STATES OF AMERICA,

vs.

ELLANCER ALLEN McGRADY.

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ORDER

THIS MATTER is before the Court on the Defendant's request to proceed *in forma pauperis* on appeal of the Court's denial of his motion filed pursuant to 18 U.S.C. § 3582(c)(2) [Doc. 676] and the Defendant's Motion to Reduce Movant's Criminal History Points [Doc. 677].

On August 30, 2012, the Defendant filed a Notice of Appeal of the Court's Order denying his request for a reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2). [Doc. 675]. The Defendant moves to proceed with this appeal *in forma pauperis*. The record in this matter indicates that the Defendant was determined to be indigent and thereby was appointed counsel to represent him in the underlying criminal proceedings. Based on this determination of indigency, the Defendant is entitled to proceed without

prepayment of fees on appeal. As such, the Defendant's request to proceed *in forma pauperis* should be denied as moot.

By way of a separate motion filed August 31, 2012, the Defendant moves for a reduction of his sentence based upon the erroneous assessment of criminal history points. [Doc. 677]. The filing of a notice of appeal generally divests the district court of jurisdiction over a case. See United States v. Wooden, 230 F. App'x 243, 244 (4th Cir. 2007). While a pending appeal does not divest the district court of jurisdiction to consider a motion to correct a sentence under Federal Rule of Criminal Procedure 35(a), see Fed. R. App. P. 4(b)(5), such a motion must be filed within fourteen days after sentencing, see Fed. R. Crim. P. 35(a).

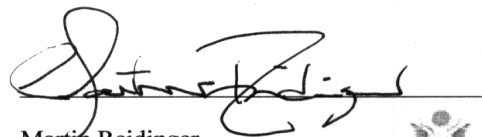
In the present case, the Defendant does not specify the Rule under which he is seeking relief. To the extent that the Defendant's motion can be construed as one to correct the judgment, the motion was filed well after the fourteen-day time period provided for in Rule 35(a). Therefore, unless and until the Defendant's appeal is dismissed or otherwise resolved by the Court of Appeals, the Court is without jurisdiction to entertain the Defendant's motion.

IT IS, THEREFORE, ORDERED that the Defendant's request to proceed *in forma pauperis* on appeal of the Court's denial of his motion filed pursuant to 18 U.S.C. § 3582(c)(2) [Doc. 676] is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that the Defendant's Motion to Reduce Movant's Criminal History Points [Doc. 677] is **DENIED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

Signed: September 13, 2012

A handwritten signature in black ink, appearing to read "Martin Reidinger", written over a horizontal line.

Martin Reidinger
United States District Judge

